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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1222

HENRY D. BAKER,

Petitioner,

vs.

WILLIAM H. DELAY, State Police Detective.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

William H. Lewis,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Henry D. Baker of Boston, Massachusetts, respectfully shows to this Honorable Court:

Summary and Short Statement of Matters Involved.

This is a petition for a writ of certiorari to the Superior Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk to review a decree of that court entered February 6, 1942, in accordance with the

opinion and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts, being the highest court of record in said State, affirming the judgment of the Superior Court and ordering "that the petitioner be remanded to custody under the warrant of the Governor for rendition to the agent of the Governor for the State of New Hampshire."

The execution of this judgment has been stayed pending petition of certiorari in this Court.

The Record shows that the petitioner was arrested as a fugitive from justice April 11, 1941. April 16, 1941, the Governor of the State of New Hampshire made a demand upon the Governor of Massachusetts for the rendition of one Henry D. Baker alias Henry MacKinnon to the State of New Hampshire to answer to the crime of robbery. The petitioner requested a hearing by the Governor; the matter was referred by the Governor to the Attorney General, in whose office a hearing was held April 25, 1941. On the 25th day of April, 1941, the Governor of Massachusetts issued a warrant directing that Henry D. Baker be delivered to the custody of an agent of the State of New Hampshire for removal to that State to answer the charge against him. Whereupon, the petitioner was taken into custody by the respondent, William H. Delay, State Police Detective; that upon the 28th day of April, 1941, the petitioner filed a petition for the writ of habeas corpus in the Superior Court for Suffolk County, being docket No. 369,498 for civil business; that upon May 23, 1941, the Superior Court dismissed his petition and May 24, 1941, petitioner claimed exceptions to the rulings and finding of the Superior Court and filed his exceptions in the Supreme Judicial Court for the Commonwealth of Massachusetts for the January Term of Court which exceptions are No. 9556 of the docket of that court; that on the 29th day of January, 1942, the Supreme Judicial Court affirmed the finding of the Superior Court and re-

manded the petitioner to the custody of the agent for the State of New Hampshire under the order of the Governor of Massachusetts.

Jurisdiction.

This is a case involving application and construction of Article IV, Section 2, of the Constitution of the United States, also of R. S. 5278, U. S. Code Annotated Title 18, Paragraph 662, being the Act of Congress to aid the enforcement of the Constitutional provision for the interstate extradition of fugitives from justice. This Court has jurisdiction by reason of Section 2 of Article III of the Constitution of the United States. The jurisdiction of this Court is invoked under the above Constitutional authorities, and more particularly, under Section 237 of the Judicial Code (as amended by the Act of February 13, 1925, paragraphs 13, 14 Stat., U. S. Code Title 28, Section 344 (b).

Questions Presented for Review.

The general question presented for review is can the finding of the Governor of Massachusetts, acting through the Attorney General, on the decree of the Superior Court for the Commonwealth of Massachusetts in accordance with the opinion and rescript of the Supreme Judicial Court for the Commonwealth, reported in Advance Sheets for 1942, numbered 221, pages 19 to 25 of this Record, be sustained?

Second, is the rendition of the petitioner to the State of New Hampshire to be determined by the Constitution and laws of the United States, to wit, Section 2 of Article III of the Constitution and R. S. 5278 or is the rendition to be determined by the State Laws of Massachusetts, General Laws (Ter. Ed. Chapter 276, Section 14, as amended by Acts of 1937, Chapter 304)?

Third, more particularly must it be shown that the petitioner was in the State of New Hampshire when the crime was committed?

Fourth, must it be shown that the petitioner was the identical person indicated in the State of New Hampshire?

Fifth, must it be shown by competent evidence that he was the person named in the Governor of New Hampshire's warrant?

Sixth, must officials be governed by legal and competent evidence in making their findings or may a citizen of one state be handed over to another state at the discretion of the Governor of the asylum state or one of his assistants?

Reasons Relied On for Allowance of Writ.

In addition to the reasons set forth in the questions presented for review it is suggested first, that more is at stake than the liberty of the present petitioner. The Legislatures of thirty-seven states in all, have passed a uniform "Criminal Interstate Extradition Law" which is revolutionary, if not unconstitutional. See "Uniform Laws Annotated" 1826-1934-1937. Acts and Resolves of Massachusetts 1937, Chapter 304. The Act of '37, under which these proceedings were had, struck out Sections 11 to 20 inclusive of the General Laws Annotated, Chapter 276, and inserted therein certain provisions inconsistent with, if not contrary to, the provisions of Article III, Section 2 and of R. S. 5278.

Second, the opinion of the Supreme Judicial Court has circumvented the provisions of the Constitution and laws of the United States.

Third, the rules of evidence and the burden of proof have been ignored or over-ridden.

Fourth, the Uniform Law with regard to extradition should be Federal rather than State; that is a citizen's right.

Conclusion.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Superior Court of Suffolk County, Commonwealth of Massachusetts, to the end that judgment entered in said case may be reviewed and reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

HENRY D. BAKER,
Petitioner,

By his attorney, WILLIAM H. LEWIS.

SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The final decree of the Superior Court was found upon (R. 19) opinion of the Supreme Judicial Court (R. 19 to 25 inclusive) Advance Sheets 1942, No. 221.

Jurisdiction.

The date of the judgment or decree to be reviewed was either February 6, or April 21, 1942. The final entry of judgment was not until April 21. The question of jurisdiction is not without difficulties. The broad power given to the courts of the United States under Article III, Section 2, "The judicial power shall extend to all cases in law and equity arising under this Constitution. The laws of the

United States etc.—provide that the Supreme Court shall have original jurisdiction in certain classes of cases and appellate jurisdiction, both as to law and fact, in all other cases with such exceptions under such regulations as Congress shall make."

St. Louis, Iron Mountain & Southern Railway Company, Plff. in Err., v. *May Taylor, Administratrix.* U. S. Supreme Court Reports, 210 U. S. 281.

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a riight or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

The exception referred to in Section 2 of Article III of the Constitution is set forth or contained in the Judicial Code (as amended by the Act of February 13, 1925) paragraphs 13, 14 Stat. U. S. Code Title 28, Section 344 (b) and R. S. 5278 U. S. Code Annotated Title 18, Par. 662.

As far as applicable to this case, the Code is as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ

of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or statute of the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

This case arose under the Constitution and Laws of the United States. The petitioner claimed and asserted his rights under the Constitution and Laws of the United States, and nothing else. "No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the Record that such rights were specially set up or claimed in the State Court in such manner as to present it to the attention of that Court.

Mr. Justice Harlan cited in the case of *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58.

The Federal question was raised by petitioner's request for rulings, as follows:

1. The Governor of this Commonwealth was without authority to issue his warrant for the arrest and rendition of your petitioner because the demand of the Governor of New Hampshire does not allege that your petitioner was present in the State of New Hampshire at the time of the commission of the alleged crime (R. 3).

4. The evidence does not warrant a finding that your petitioner was in the State of New Hampshire at the time of the commission of any crime alleged in the papers of demand by the Governor of New Hampshire (R. 4).

6. A written statement under oath, made simply upon information and belief, does not possess the qualities of an affidavit (R. 4).

8. The Governor of this Commonwealth was without authority to issue his warrant for the arrest and rendition of your petitioner because the alleged affidavit of Ralph W. Caswell that your petitioner was in New Hampshire at the time of the commission of the alleged crime and that he fled from the said State of New Hampshire is actually based on information and belief and is not the sworn evidence required by the said G. L. (Ter. ed.) Ch. 276, Sec. 11 as amended by Acts 1937, Chap. 304 (R. 4).

9. The accused in custody must be the identical person charged with crime in New Hampshire, and named in the requisition and Governor's warrant of rendition (R. 4).

10. The burden of proof in this proceeding where the alleged fugitive has denied identity is upon the respondent (R. 4).

15. On all the evidence the court is warranted in finding that the Governor of this Commonwealth did not have before him competent evidence to the effect that your petitioner is a fugitive from the justice of New Hampshire (R. 5).

Statement of the Case.

See Statement in the petition. In addition thereto the Bill of Exceptions contains all the evidence before the Governor of the Commonwealth, in this case, and all the evidence before the court on the hearing on the petition for habeas corpus (R. 1-10). The Record shows that Ralph W. Caswell, investigator attached to the office of the Attorney General whose affidavit was attached to the papers of the Governor of New Hampshire, was made upon information and belief; that he had no personal knowledge and that he interviewed no one who saw the crime committed. The affidavit of John F. Beamis, Jr., solicitor for Strafford County, attached to the application of the Governor of

New Hampshire was also upon information and belief. The Record does not show that any competent evidence was presented to the Governor or to the court that petitioner had been in the State of New Hampshire and that he was the man indicted in that State.

The Governor referred the matter of the hearing to the Attorney General and one of his assistants heard the evidence (R. 1). At a hearing before Judge Fosdick, Superior Court, it was agreed that one James E. Whiteman stated that there were two men who robbed them. He had a very good look at one of the men but not such a good look at the other but the petitioner was not the man. Mrs. Sarah Miller testified that the petitioner was at her home in Dorchester, Massachusetts, at 2:30 October 16, 1936 (R. 2). The petitioner offered to prove that he was not the person demanded in the requisition papers of the Governor of New Hampshire; that he was not the person named in the warrant. Petitioner contended before the Court that in habeas corpus proceedings he had a right to go into the question of whether or not he was the person demanded and that he had a right to go into the question of whether or not he was present in the State of New Hampshire at the time the crime was committed. Court conveyed the issue to the question of whether or not there was evidence before the Governor of this Commonwealth on which he could issue his warrant (R. 3).

Arguments, Points and Authorities.

I.

The Statutes.

R. S. 5278 or Section 662 of Title 18 of the Criminal Code enacted to carry into effect the provisions of Section 2 of Article III of the Constitution with reference to rendition of fugitives from justice and provides in substance "that

whenever the executive authority of a state demands as a fugitive from justice of the executive authority of another state to which such person has fled and produce a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with having committed crime, etc., certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause the fugitive to be arrested and delivered to the agent of the demanding state." The Massachusetts Statutes, as amended, being Chapter 276, Section 14 of the General Laws as amended by Chapter 304 of the Acts and Resolves of 1937 which provide in substance:

Section 1 of the Act strikes out Sections 11 to 20 inclusive of Chapter 276 of the General Laws. Inserts in Section 11 certain definitions, to wit, "governor" includes any person performing the functions of governor by authority of the law of this Commonwealth.

Section 12 provides subject to the provisions of Section 11 to 20R inclusive, the controlling provisions of the Constitution of the United States, and any and all acts of Congress enacted in pursuance thereof, the governor may cause to be arrested and delivered up to the executive authority of any other state any person charged in such other state with treason, felony or other crime, etc.

Section 13 provides that "Sections 11 to 20R inclusive, not otherwise inconsistent shall apply to such cases, *even though the accused was not in the demanding State at the time of the commission of the crime.*

Section 14 with regard to the demand that no demand shall be recognized by the governor, "unless such demand is accompanied by a copy of an indictment found, or of an information supported by affidavit, in the demanding state,

or by a copy of an affidavit made before a magistrate of such state, and by a copy of the warrant which was issued thereon, or by a copy of a judgment of conviction etc., * * *." The indictment or information, or the affidavit made before the magistrate who issued the warrant, shall substantially charge the person demanded with having committed a crime under the law of the demanding state, and the copy of the indictment, information, affidavit, judgment or conviction or sentence shall be authenticated etc.

Section 15 provides that the Governor may call upon the Attorney General or other prosecuting officer to investigate or assist in investigating the demand and to report to him the situation as to whether the person demanded should be surrendered.

Section 16 provides that if the Governor decides that the demand shall be complied with, he shall sign the warrant of arrest, etc.

Section 20H Guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor, "except as it may be *involved in identifying the person held as the person charged with the crime*".

Section 20R provides that Sections 11 to 20R inclusive may be cited as the uniform criminal interstate rendition law, and shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states enacting similar laws.

Section 3 This act shall take effect on October first in the current year. Approved May 12, 1937.

The opinion of the Supreme Judicial Court says at (R. 20) "there was also attached to the requisition an affidavit of one Caswell stating that Baker was in the city where the alleged robbery occurred at the time of its commission and that he thereafter fled to this Commonwealth and the copy of an application for the extradition of Baker made to the

Governor of New Hampshire by the County Solicitor of the County where the alleged robbery was committed stated that the evidence was sufficient for the conviction of the fugitive." Upon the question of the petitioner's presence in the State of New Hampshire the court said further (R. 21): "It is true that the demand of the Governor of New Hampshire does not expressly state that Baker was in that State at the time of the crime, but it plainly appears from the demand that Baker was charged with a crime, the nature of which required his presence at the time and place where the offence occurred, and that thereafter he fled to this Commonwealth." It is difficult to follow that kind of reasoning which proved that the man was present in New Hampshire because of the charage that the crime was committed in New Hampshire. The indictment charged the commission of a robbery which the demand itself shows was a crime in that State. That seems to satisfy the Court that the man was present in the State of New Hampshire.

The court further said that (R. 21) neither the Federal Statute nor the General Laws Chapter 276, Section 14, as amended requires sworn evidence in addition to the demand and the properly authenticated copy of the indictment. It is clear that the demand and the accompanying documents complied with the applicable statutes and authorized the Governor of this Commonwealth to honor the requisition *if he found upon such evidence as he deemed satisfactory* that the person demanded was a fugitive from justice of New Hampshire." Therefore it is contended that any evidence that satisfied the Governor would be sufficient evidence to deprive this man of his liberty. The court further speaking of the testimony of Caswell upon whose affidavit the requisition was presented (R. 2) his testimony was to the effect that he was unable to find any witness who identified the petitioner at the time of the robbery. "There

was nothing in this testimony which effected his statements in the affidavit that Baker was in the city where the robbery was committed at the time of its occurrence and that he afterwards fled to this Commonwealth." That is to say his affidavit, the facts of which he had no personal knowledge, admittedly presented on information and belief, was sufficient to satisfy the requirements of the law. The court refers to the testimony of the witness to the effect that Baker was not the man whom he had closely observed. "The court said there was no error if the Judge refused to find that this evidence out-weighed the effect that ought to be given to the rendition warrant and refused to find that Baker was not a fugitive from justice." Here again the Judge could find that Baker was a fugitive from justice because there was no evidence that he was not a fugitive from justice. On the contrary, there was plenty of evidence heretofore referred to that he was not a fugitive from justice. In the teeth of all the evidence the court finds that the petitioner was a fugitive from justice, and that decision is sustained because the Supreme Court says that the Judge might find that the hearsay testimony of the papers in the case, the rendition warrant and affidavit was sufficient. The court says again "a petitioner for writ of habaes corpus who is held as a fugitive from justice, has the burden of making it clearly and satisfactorily to appear that he is not a fugitive within the meaning of the Constitution and Laws of the United States." The court said again (R. 23) "that the petitioner however, was not indicted under a fictitious name or under any name other than his true name." There is absolutely no evidence upon that proposition whatever. Court said that the petitioner did not raise any question of his identity at the hearing upon the granting of the requisition. Request for rulings and instructions will show exactly what he did do.

The Warrants.

The warrants of the demanding State and the surrendering State of the Governor of New Hampshire and the Governor of Massachusetts, were based upon hearsay evidence. There was no competent evidence on which either Governor could have found that the petitioner was a fugitive from justice. It has been well said: "If a warrant, in the first instance, may issue upon mere hearsay or belief, then all the guards of the common law and of the Bill of Rights of our own Constitution, to protect the liberty and property against arbitrary power, are swept away."

> "If a county attorney can not make such verification, then the information or complaint should be made by the oath of someone who can."
>
> *State* v. *Gleason,* 32 Kansas Reports at 251.

Ex-parte Jowell, 223 S. W. 456. "Criminal appeals of Texas, 1920.

The evidence disclosed in a proceeding brought upon habeas corpus that an affidavit was filed by the county attorney in Montana, the demanding state, it was direct and positive in its terms. He was placed as a witness on the trial of the habeas corpus proceedings, testified substantially that he knew nothing of the transaction nor had he seen the relator in Montana in possession of the alleged stolen property. The relator contended that he was not in Montana at the time of the alleged robbery. County attorney testified that he did not see him and knew nothing about him. The relator took the witness stand and offered to produce witnesses to show that he was not in Montana at the time of the theft. Court held: "from that evidence that the judgment in the lower court dismissing the petition should be reversed and the relator given an opportunity to produce his evidence."

Question of Identity.

This is the vital question under the Constitution and Laws of the United States. *American Jurisprudence,* Volume 22 says:

"The question of the identity of a person held under a rendition warrant issued by the Governor of the asylum state with the person described as the alleged fugitive in such warrant and requisition papers are always opened to judicial review by habeas corpus. Such question is simply whether the warrant has been executed against the party named therein."

Lee Gim Bor v. *Ferrari,* 55 Federal (2nd) 86.
Chase v. *The State,* 93 Florida, 963.
Keller v. *Butler,* 246 New York, 249.
People ex rel. Corkran v. *Hyatt,* 172 New York, 176, 188 U. S. 691.

"The Federal Constitution does not provide for the expedition of any persons except those who have fled from or left the state as fugitives from justice."

Mahon v. *Justice,* 127 U. S. 700.
Tennessee v. *Jackson,* 36 Federal 258.
Ex parte Innes, 77 Texas Criminal Reports, 351.
Innes v. *Tobin,* 240 U. S. 127.

Summary.

It is the contention of the petitioner that he is not a fugitive from justice of New Hampshire; that he is not the person indicted in New Hampshire; that he is not the person demanded and named in the Governor's warrant; that the demanding papers of the Governor of New Hampshire are not accompanied by competent evidence that the petitioner is the person who committed the crime or that he is a fugitive from justice of that state; that the Governor of

Massachusetts, acting through the Attorney General, acted upon information that was not legally competent or sufficient to justify the issuance of his warrant; that all the allegations necessary to make the petitioner a fugitive from justice must appear affirmatively to warrant his arrest and rendition.

The leading case in this Court, *Hyatt* v. *New York ex rel. Corkran,* 188 U. S. 691.

Mr. Justice Peckham cited with approval language used by Mr. Justice Harlan in *Ex parte Reggell,* to this effect:

"In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding state, and therefore could not be said to have fled from its justice."

The contention that the petitioner may be surrendered if the papers are proper simply because his name happens

to be Henry Baker without any evidence that he was the person indicted or that he was present in New Hampshire at the time of commission of the crime is just about what the position of Massachusetts authorities in this case boils down to. It can hardly be considered the American way.

Conclusion.

The petitioner, therefore, respectfully submits that this case is one calling for the exercise by this Court of its supervisory powers over a State Court administering the Federal Constitution and Laws to the end that there may be uniformity of decisions; to the end that there may be uniform rules with regard to interstate rendition; and therefore, prays a writ of certiorari should be granted and that this Court should reverse the decision of the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, and discharge the petitioner or send the case back to the Superior Court directing that Court to give the petitioner a full and fair hearing.

HENRY D. BAKER,
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